No. [illegible]

Petition for Certiorari

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Brief for Petitioners

IN THE

Supreme Court of the United States

October Term, 1930

EDGAR PERCY LEWIS and RICHARD F. COOPER, as Trustees Under the Will of Arthur Francis Thomas Cooper, Deceased, PETITIONERS,

vs.

MARSHALL S. REYNOLDS, Individually and as Collector of Internal Revenue, RESPONDENT.

ON PETITION FOR CERTIORARI TO REVIEW A JUDGMENT OF THE CIRCUIT COURT OF APPEALS, TENTH CIRCUIT

N. E. CORTHELL,
Attorney for Petitioners.

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Petition for Certiorari

To The Honorable, The Supreme Court of the United States:

The petition of Edgar Percy Lewis and Richard F. Cooper, as trustees under the Will of Arthur Francis Thomas Cooper, Deceased, respectfully shows to the Court as follows:

The petitioners seek in this action to recover for overpayment of an additional income tax paid by them to the defendant as Collector of Internal Revenue.

The action was brought in the District Court of the United States for the District of Wyoming, upon which jurisdiction is conferred by Judicial Code, Sec. 24, Par. 5, 44 Stat. 866.

The trial court made special findings upon which judgment was entered August 29, 1930, for the defendant. (R. 6-9)

The case was taken by appeal to the Circuit Court of Appeals for the Tenth Circuit, which court on March 19, 1931 affirmed the judgment. On April 27, 1931 the mandate was stayed for thirty days, conditioned on the filing of petition for certiorari. (R. 47, 55)

Your petitioners are advised that the Circuit Court of Appeals was in error in affirming the judgment, and should have reversed the judgment of the trial court and directed judgment for the petitioners upon the findings made by the trial court.

The tax return for 1920 was filed February 18, 1921, additional tax determined November 24, 1925, payment made March 21, 1926, application for refund filed July 27, 1926, and rejected May 18, 1929. (R. 6-8).

In rejecting the application the Commissioner conceded substantially all of the claims made and based the rejection on a reversal of his finding upon an item of deduction which had been allowed in the assessment. (R. 7-8).

The decision of the Circuit Court of Appeals involved the following questions, all of which were determined against the petitioners:

1. The court decided explicitly that upon the application for refund the Commissioner had the power to redetermine the tax; and that the burden was on the tax payers to prove that the redetermination was wrong. (R.46.) This decision, by necessary implication, upon the facts found, gave effect to the redetermination as transforming, reconstructing and increasing the tax originally assessed, thus substituting a new and different basis for the plaintiffs' cause of action.

The decision is believed to be entirely novel. It is applicable to all tax recovery cases. It involves among other consequences:

2. Disregard of the five year statute of limitations upon the determination and assessment of a tax. (Rev. Act of 1926, Sec. 277 (a) (3), 44 Stat. part 2, p. 58.).

3. Disregard of the statute prescribing due process in the form of notice of the proposed assessment. (Rev. Act. of 1926, Sec. 283 (a), 44 part 2, p. Stat. 63).

4. Depriving the tax payer of the statutory remedy of appeal from the Commissioner to the Board of Tax Appeals. (Rev. Act. of 1926, Sec. 274 (f), 44 Stat. part 2, p. 56.).

5. Transposing the burden of proof from the party attacking to the party relying upon the findings made in the assessment. (R. 46, Gen. Lead Batteries Co. vs. Com. 2 B. T. A. 392, 395.)

6. Adding further divergence and confusion to the inter-circuit conflict of authority concerning the power to redetermine a tax, exemplified in Woodworth vs. Kales (CCA6) 26 F. (2d) 178, 180-183; Loewy vs. Com. (CCA2) 31 F. (2d) 652; Holmquist vs. Blair (CCA8) 35 F. (2d) 10; and McIlhenny vs. Com. (CCA3) 39 F. (2d) 356.

Your petitioners therefore are advised and show that the Circuit Court of Appeals in holding that the Commissioner, upon the application for a refund, had power to redetermine the tax, giving such redetermination the effect of a reassessment, has decided an important question of Federal law which has not been but should be settled by this court; that in deciding that such redetermination could be made after the expiration of the five year Statute of Limitations, it has decided a Federal question in a way probably in conflict with the applicable decisions of this court; that in giving such effect to the redetermination of the Commissioner, in the absence of notice to the tax payers, it has decided a further Federal question in a way probably in conflict with the applicable decisions of this court in relation to due process; that in transposing the burden of proof from the Commissioner to the tax payer, in respect to the Commissioner's finding in the original assessment of the tax, it has decided an important question of general law in a way probably untenable and in conflict with the weight of authority; that in sustaining the authority of the Commissioner, in the absence of fraud and without additional evidence, to redetermine the tax, it has increased the divergence and conflict already existing between the decisions of several of the Circuit Courts of Appeals on the same matter.

Your petitioners herewith as a part of this petition present a complete transcript of the record and proceedings in the Circuit Court of Appeals.

Your petitioners pray that an order may be made to review the decision of the Circuit Court of Appelas in this cause and that the certified transcript of record herewith presented be

treated as though sent up in response to a formal writ; that this court reverse or modify the decision and judgment of the Circuit Court of Appeals and direct that Court to enter a judgment reversing the judgment of the District Court and directing a judgment to be entered in favor of the petitioners and against the defendant; and that your petitioners may have such other and further relief in the premises as to this Court may seem fit.

EDGAR PERCY LEWIS and RICHARD F. COOPER, as Trustees under the Will of Arthur Francis Thomas Cooper, Deceased,
Petitioners.

By: N. E. CORTHELL,
Their Attorney. Laramie, Wyoming

State of Wyoming, }
County of Albany. } ss.

Nellis E. Corthell, being duly sworn says that he is counsel for Edgar Percy Lewis and Richard F. Cooper, Trustees under the Will of Arthur Francis Thomas Cooper, Deceased, Petitioners; that he prepared the foregoing petition and that the allegations thereof are true as he verily believes.

N. E. CORTHELL.

Subscribed and sworn to before me this 23rd day of May, 1931.

A. W. McCOLLOUGH,
Notary Public.

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vs.

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Brief for Petitioners

STATEMENT OF THE CASE

The petition in this case is presented under Judicial Code 240 (a) seeking review of a decision of the Circuit Court of Appeals of the Tenth Circuit, affirming a judgment of the District Court of Wyoming in an action brought by the petitioners as plaintiffs against the defendant as Collector of Internal Revenue to recover for overpayment of an additional tax.

The opinion of the District Court (R. 37-40) is reported as Collinson vs. Reynolds, 43 (2d) 395. The opinion of the Circuit Court of Appeals (R. 44-46) has not yet been published in the Federal Reporter.

The case involves an additional income tax of the A. F. T. Cooper Estate for 1920, the ultimate controversy being confined to a single item of $20,750.00, deduction which the Commissioner had allowed in the assessment but repudiated in rejecting the application for refund. The District Court found in conformity with the petition, the admissions, and the proofs, that the tax return was filed February 8, 1921, and the indicated tax paid; that among the deductions from gross income claimed

were $20,750.00 for attorney's fees and $16,870.00 for Wyoming Inheritance Tax paid by the estate; that, after considering the return, the report of a revenue agent, and the protest of the taxpayer, the Commissioner, in November, 1925, redetermined the tax, found that the greater portion of the item of $20,750.00 represented a business expense of the estate and allowed the same as a deduction; but disallowed the State Inheritance Tax, $16,870.00, holding that it was deductible only by the beneficiaries of the estate. Upon this determination, an additional tax of $7,297.16 was assessed by the Commissioner and was paid by the plaintiff on March 20, 1926. On July 29, 1926 a claim for refund was filed, which was rejected on May 18, 1929. In the notification of rejection the Commissioner advised that the item of $16,870.00 inheritance tax was allowed and certain minor allowances in computing the tax made, but that the item of $20,750.00 attorneys' fees was "disallowed," and that an increase of tax resulted, the collection of which was barred by the statute (R. 6-8). The evidence upon which the findings were based included the Commissioner's letter of November 24, 1925 (R. 17) notifying the assessment in which (R. 18) he found that the item of attorneys' fees was chiefly a "business expense" and allowed it as a deduction; and his letter of May 18, 1929 (R. 22) rejecting the application for refund, in which (R. 23) he called the item an "administration expense"; and the rejection was based upon this ground.

Upon the findings the court gave judgment for the defendant (R. 8). The Circuit Court of Appeals affirmed the judgment (R. 47).

ERRORS RELIED UPON

The case as thus presented and decided by the two courts turns solely on the item of $20,750.00 attorneys' fees claimed by the taxpayers and allowed in the assessment as a deduction from gross income. At no stage of the present suit has there been any contention over any other element of the plaintiff's claim. If the allowance of this item of deduction, made by the Commissioner in the assessment, controls, the plaintiffs are entitled to recover (with minor deductions) the amount claimed in the petition. If, on the other hand, the Commissioner's

"redetermination," in rejecting the application for refund, that this item was not an allowable deduction, controls, the judgment was properly affirmed by the Circuit Court of Appeals on the record.

The decisions of the District Court and the CircuitCourt of Appeals, as explained by the opinions (R. 37, 44), gave effect to the "redetermination" of the tax by the Commissioner, in rejecting the application for refund, as the controlling exposition of the tax. The errors alleged are based upon this interpretation of the law. They may be summarized as follows:

1. *The Commissioner had no authority, in considering the application for refund, to "redetermine" the tax in the sense of substituting a different assessment for that which had been made.*

2. *The attempted "redetermination" of the tax was made more than five years after the date of filing the return and was therefore barred.* (Rev. Act of 1926, Sec. 277 (a) (3), 44 Stat. part 2, p.58).

3. *The attempted "redetermination" of the tax was made without the notice prescribed by statute* (Rev. Act of 1926, Sec. 283 (a), 44 Stat. part 2, p. 63) *and was therefore void for want of due process.*

4. *The circumstances under which the attempted "redetermination" was made deprived the plaintiffs of the statutory remedy of appeal from the assessment to the Board of Tax Appeals.*

5. *The decision imposed upon the plaintiffs the burden of justifying the finding of the Commissioner in the assessment of the tax and disproving his assertion in rejecting the application for refund, contrary to the established presumption in favor of the former finding.*

6. *Apart from the five year Statute of Limitations above referred to, the decision extends and increases the inter-circuit confusion of authority on the question of the extent and limitations of the power of the Commissioner to re-examine, redetermine, and re-assess a tax after the original assessment.*

ARGUMENT

I.

The Commissioner had no authority, in considering the application for refund, to "redetermine" the tax in the sense of substituting a different assessment for that which had been made.

It is believed that the decision of the Courts in this case, in respect to the point here stated, is altogether novel. Neither the Courts nor counsel have been able to find a precedent. The District Court (R. 38) cited the case of McIlhenny vs. Commissioner, 39 F. (2d) 356, which was brought to the notice of the Court after the submission of the cause. But it was pointed out in the Plaintiffs' brief in the Circuit Court of Appeals that the revision of the assessment in that case was made within the statutory period, (13 B. T. A. 288), that it was made after the statutory notice and not on an application for a refund, and that the Court expressly distinguished the proceeding from that involved in Woodward vs. Kales, (cited, infra), as involving a question of law and not a question of fact.

The Circuit Court of Appeals cited (R. 46) the case of Champ Spring Co. vs. U. S., 47 F. (2d) 1, which also came to the attention of the court after the submission of the cause. It was pointed out in the petition for re-hearing (R. 50) that the tax there involved, was voluntarily returned and paid by the taxpayer and subsequently erroneously refunded; and that the Court expressly stated (p. 2) that it was not necessary to determine whether the Collector had authority to make a re-assessment.

The only reported case which appears to offer any analogy to the proceeding here involved is Western Wholesale Drug Co. vs. U. S., 47 F. (2d) 770, in which the Commissioner undertook to justify his rejection of an application for refund of a 1919 overpayment on the ground that an error had been made in determining a credit on account of over-assessment for 1920. The time for re-assessment had passed and the Court held, as, indeed, the Solicitor of Internal Revenue had earlier advised (I-1 Com., Bul. 313), that the Commissioner had no power to withhold an overpayment for 1919 because of the claimed underpayment for 1920.

This case would seem to be merely an application of the rule plainly expressed in Rev. Act of 1928, Sec. 609, 45 Stat. 875, which reads as follows:

"(a) Any credit against a liability in respect of any taxable year shall be void if any payment in respect of such liability would be considered an overpayment under Sec. 607." * * * *. Sec. 607 (45 Stat. 874) reads as follows:

"Any tax * * * * assessed or paid * * * * after the expiration of the period of limitation properly applicable thereto shall be considered an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim."

If, in the case at bar, the letter of the Commissioner in 1929 rejecting the application for refund be treated as an assessment it seems plainly to fall under the ban of these provisions of the statute. Recognition of this result was expressed in the Commissioner's letter of May 18, 1929 (R. 23), summing up his conclusion with respect to the "redetermination" of the tax, as follows: "Since the correct computation results in an additional tax as indicated above which is barred from assessment by the Statute of Limitations your claim will be rejected", etc.

Like recognition is found in the opinion of the Circuit Court of Appeals (R. 46) where it was said:

"While no new assessment can be made after the bar of the statute has fallen the taxpayer, nevertheless, is not entitled to a refund unless he has overpaid his tax."

It affords little satisfaction to an aggrieved taxpayer to be thus told that there can be no new assessment, if what the Commissioner did or said be given the effect of a new assessment. Both the District Court (R. 40) and the Circuit Court of Appeals (R. 46) designated the action of the Commissioner in rejecting the application for refund as a "redetermination" of the tax. Thus a distinction seems to be drawn between a "redetermination" and a "re-assessment."

We have no wish to substitute logomachy in this connection for the process of ideation which we think is called for by the exigencies of the case. We are concerned with substance rather than words, with the nature and purpose of the act rather than definition of language.

On an application for a refund the Commissioner undoubtedly has the power, as it is his duty, to reexamine all questions of fact and of law upon which the right to repayment depends; and this manifestly involves a review of the assessment and a "determination" of the right of the taxpayer to repayment. But such determination is not a judicial or even a quasi-judicial settlement either of the facts or the law involved. It is solely concerned with the Commissioner's action—whether to pay or refuse payment. It has nothing to do with laying the tax or fixing the liability of the taxpayer.

The taxpayer's cause of action does not arise or depend upon the action of the Commissioner in granting or rejecting an application for refund; nor is the suit in the nature of an appeal from the Commissioner's decision refusing the refund. The taxpayer is not even obliged to await action on his application. At the expiration of six months he may proceed with his suit, whether the Commissioner has acted or not. In the interim his right of action is suspended.

The primary purpose of the statute requiring an application to be made before suit is "to permit the Commissioner, of his own volition upon discovery of any overpayment to credit or refund the same," ets.

Fox vs. Edwards, 287 F. 669, 673.

The requirement that an application should be made is in plain analogy to statutory or other requirements, in varying situations, that a demand shall be made before suit.

"The primary object of a demand is to enable a defendant to perform his obligation or otherwise discharge his liability without being subjected to the inconvience and expense of litigation."

1 C. J. 979

Cox vs. Delmas, 99 Calif. 104.

Hurd vs. Lodge, 20 Pick. 53

Guthrie vs. Olson, 44 Minn. 404

We believe it has never been suggested that a debtor upon whom a demand is made for payment of his debt can, by writing a letter or by other form of asseveration in his response, extinguish, alter or affect his obligation. Yet this seems to be the effect given to the Commissioner's letter rejecting the application for refund.

The "tax" involved in this suit is, of course, the same tax which was involved in the application for refund. It was the obligation defined by the assessment, which alone gave it form and substance. Of necessity the application for refund was formulated on that basis. It pointed out specificially the errors in disallowing deduction of the Wyoming Inheritance Tax of $16,870.00; the disallowance of the claim of personal exemption of $1,000.00; the computation of the tax on the first $4,000.00 at 8% instead of 4%, (R. 21-22), all of which were conceded. It made no reference to the item of $20,750.00 attorney's fees because that item had been allowed, (R. 18). This allowance was as much a constituent part of the tax as any other item which had been fixed by the assessment. The taxpayers had a right to rely upon it; indeed, they could not do otherwise than accept a finding in their favor. As this Court said in Bonwit Teller & Co. vs. U. S., 51 S. C. Rep. 395, "No statute provides for review of the Commissioner's determination in favor of taxpayers when made within the scope of his authority."

The process by which the Commissioner sought to avoid repayment is essentially a pleas of confession and avoidance. The errors specified in the application for refund and relied upon in the suit were errors of law appearing upon the face of the assessment. They were established by cumulative decisions of the courts, finally recognized by statute and conceded by the Commissioner in his letter of May 18, 1929, (R. 23). No new facts were then brought forward by the taxpayer or by the Commissioner. In his letter rejecting the application he described his action as a correct "computation" resulting in an additional "tax". In the opinion of the District Court (R. 38) the process was described as a modification and "change of the assessment" schedules, and in the opinion of the Court of Appeals (R. 46) it was described as a "redetermination of the entire tax liability."

This graduated evolution from a "computation" through a "change of assessment" into the "redetermination of the entire tax liability", as it was characterized by the Court of Appeals leaves no room for doubt that the Commissioner's letter rejecting the claim for refund was given full effect as a determination or assessment of the tax, superseding the assessment of 1925 upon which payment was made. Thus the "additional tax", which the Commissioner admitted was barred from assessment (R, 23), becomes the only tax considered in the case; and while, as the Court of Appeals said, (R. 46),"No new assessment can be made," the letter is treated as a substitute, eliminating the taxpayers' cause of action and tendering a new issue with added burdens; all of which was the irrelevant, unprovoked and unwarranted consquence of a demand for the payment of money due.

What the Commissioner did and what the Courts sanctioned in this case was to apply an admitted overpayment of the tax assessed upon an asserted claim of a tax for the same year, differently constituted and assumed to be assessed without notice, after the finding regularly made in the timely assessment of the tax. Apart from the specific objections discussed, infra, the petitioners submit that such action has none of the characteristics of a statutory assessment and that no "tax" in any proper or leagl sense can be predicated thereupon.

In the District Court, counsel for the defendant contended that since the Commissioner had conceded the errors claimed on the application for refund, the suit could not be maintained because the plaintiffs had not sought a refund or based their suit upon the disallowance of the item of $20,750.00. And in the Circuit Court of Appeals they suggested that "an alert taxpayer would have immediately filed another claim if it thought there was any foundation for it." The futility of this contention seems self evident. The taxpayers set up the only ground for refund which existed or arose upon the assessment made and the tax exacted. They had made no payment and could not be required to pay on the basis of the Commissioner's redetermination in rejecting the application. There was in fact, no such tax and none could be assessed as the Commissioner and Court of Appeals expressly admitted. Moreover, a

new application for refund would have invited a new "redetermination" and each succeeding application would be the occasion for another "redetermination". If the Commissioner and the Courts have correctly interpreted the law, it must be left to the imagination to conjecture just how nimble, patient and persistent a taxpayer would need to be to bring this circular procedure to an end. Taxpayers are mortal; the Commissioner has the advantage of a continuous entity-an official immortality which must outlast the taxpayer in any such a contest.

II

The attempted "redetermination" of the tax was made more than five years after the date of filing the return and was therefore barred. (Rev. Act of 1926, Sec. 277 (a) (3), 44 Stat. Part 2, P. 58).

The additional assessment involved was made by the Commissioner November 24, 1925 (R. 17-19). As the return was filed February 18, 1921, the period for assessment expired February 18, 1926 under the terms of the applicable Revenue Act of 1918, Sec. 250 (d), 40 Stat. 1083, (continued in subsequent acts) which read as follows:

(d) "Except in the case of false or fraudulent returns, with intent to evade the tax, the amount of tax due under any return shall be determined and assessed by the Commissioner within five years after the return was due or was made."

As we have already pointed out, the decisions of the Courts below gave effect to the Commissioner's letter on May 18, 1929, as a "redetermination" of the tax which we have assumed is equivalent to a reassessment, as these words are apparently used, in this connection, interchangeably.

The statute does not seem to require construction although numerous attempts are found among the reported cases to avoid its effect. If the statute were deemed to require or admit of interpretation it is a recognized rule that this, like other provisions of the tax acts, is to be construed liberally in favor of the taxpayer.

U. S. vs. Updike, 281 U. S. 489, 496.
U. S. vs. Michel, 51 S. C. Rep. 284.

In one aspect the present case may be regarded as an attempt to collect an undetermined or unassessed tax by applying, as a credit, the overpayment found by the Commissioner to be due the plaintiffs on the assessment actually made.

In principle, we perceive no difference between such an attempt and an attempt to apply an overpayment for one year on a tax for a different year; nor does it seem that any such difference is contemplated by Rev. Act of 1928, Sections 607 and 609, (45 Stat. 874, 875) above cited.

Section 609, by its express language, forbids a credit upon a barred tax liability of "any" year; it need not be a liability of another or a different year. If the liability is one which is barred from assessment it cannot be indirectly collected by crediting an overpayment.

In effect such seems to be the nature of the attempt in the present case. Overpayment of the tax assessed was admitted and it was also admitted that an assessment of the alleged liability for that year was barred. If Sections 607 and 609 are to have any application at all it would seem that they must operate upon such a condition. The case seems to come well within the reason of the rule laid down by this Court in Bowers vs. New York and A. Lighterage Co., 273 U. S. 346, 350, 351, where it was said of a limitation on tax collections that "the provision is a part of a taxing statute; and such laws are to be interpreted liberally in favor of the taxpayers. * * * * A reasonable view of the matter is that it was the intention of Congress, by the clause here in question to protect taxpayers against any proceeding whatsoever for the collection of tax claims not made and presented within five years."

The device employed by the Commissioner in the case at Bar must be considered as a method of collecting a tax which had not been assessed within the statutory period and which cannot thereafter be assessed, as the Court of Appeals expressly stated in its opinion.

The decision sustaining the action of the Commissioner in this case is essentially in conflict with the decision of this Court in Bonwit Teller and Co. vs. U. S. 51 S. C. Rep. 395, cited un-

der the first point in this brief. Aside from the informality of the claim for refund in that case there is a marked anoligy between its material facts and the facts in the case at Bar.

In both cases the Commissioner decided that there was an over-assessment. In the Bonwit Teller case he had withheld a part of the allowance to offset a claimed deficiency in the tax of a former year, as in the case at Bar he withheld the allowance for a claimed deficiency in the tax for the same year. In neither case was the claimed deficiency assessed within the statutory period. As we have pointed out above, the statute (Rev. Act 1928, Sec. 607 and 609, 45 Stat. 874, 875) which prohibits the setting off of an overpayment against a tax liability for "any" year unless such tax has been assessed within the statutory period applies equally to a liability for the same year or for another year. The essential rule applied in the Bonwit Teller case therefore controls the rights of the parties in this case and justifies the plaintiffs' claim. The same rule was applied in Western Wholesale Drug Co., vs. U. S., 47 Fed. (2d) 770, and was also earlier laid down in an opinion of the Solicitor of Internal Revenue in I-1 Cumulative Bulletin, 313, Supra.

III

The attempted "redetermination" of the tax was made without the notice prescribed by statute (Rev. Act of 1926, Sec. 283 (a) 44 Stat. 63) *and was therefore void for want of due process.*

The comprehensive taxing power of the Federal Government has always borne certain fundamental limitations. The Sixteenth Amendment to the Constitution removed one of the most important of these; but the Fifth Amendment is still operative; and its restraining effect was stated by this Court, as an axiom of tax procedure in Lipke vs. Lederer, 259 U. S. 557, 562, as follows: "Before collection of taxes levied by statutes enacted in plain pursuance of the taxing power can be enforced; the taxpayer must be given fair opportunity for hearing,--this is essential to due process of law."

The tax legislation of Congress has proceeded, we believe, from the beginning in recognition of this fundamental principle; and while the details of procedure have undergone changes from time to time, the right to a hearing in some form has always been recognized. In Rev. Act of 1918, (40 Stat. 1141, Sec. 1301, (d) (1)), provision was made for an Advisory Tax

Board in the Bureau of Internal Revenue to which, at the election of the Commissioner or the taxpayer, any question relating to the interpretation or administration of the income etc., tax laws might be submitted for an advisory report.

By the Rev. Act of 1924, Sec. 900 (43 Stat. 335) the Board of Tax Appeals was established with power to hear and determine appeals in deficiency assessments and claims in abatement. That act made important modifications in the procedure prescribed for making deficiency assessments. By Sec. 274 (a) 43 Stat. 297, (substantially reenacted in succeeding Revenue Acts, including Rev. Act of 1926, Sec. 283 (a) 44 Stat. 63,) it was provided that "if in the case of any taxpayer the Commissioner determines that there is a deficiency in respect of the tax imposed by this title, the taxpayer * * * * shall be notified of such deficiency by registered mail, but such deficiency by registered mail, but such deficiency shall be assessed only as hereinafter provided."

The taxpayer thereupon was given sixty days after the presecribed notice within which to file an appeal with the Board of Tax Appeals; and the determination of the Board was made binding upon the Commissioner; but a proceeding in Court was authorized without assessment for the collection of any part disallowed by the Board.

The historical development of the procedure is set out in some detail in the opinion of the Court in Joseph Garneau Co. vs. Bowers, 8 Fed. (2d) 378, and the essential changes are more succinctly stated in Williamsport Wire Rope Co. vs. U. S., 277, U. S. 551, 562.

The result of this development in tax procedure is to establish two methods of tax collection: (1) By assessment initiated by the Commissioner with notice to the taxpayer involving the right of appeal to the Board. In the absence of appeal the Commissioner's assessment stands. If an appeal is taken the Commissioner's power of assessment ceases and passes to the Board. (2) By a proceding in Court without assessment for the collection of any part of the Commissioner's determination disallowed by the Board. (Rev. Act 1924, Sec. 274 (b) 43 Stat. 277).

The procedure thus established for the determination of deficiency taxes is in sharp contrast to the procedure involved in the Commissioner's letter of May 18, 1929 asserting a "redetermination" of the tax liability of the plaintiffs in this case. It is submitted therefore, that, apart from any other question involving its validity, such "redetermination" was altogether lacking in the element of due process guaranteed by the Constitution and prescribed by applicable statutes.

"When a statute limits a thing to be done in a particular mode it includes the negative of any other mode."

Botany Worsted Mills vs. U. S., 278, U. S., 282, 289.

IV.

The circumstances under which the attempted "redetermination" was made deprived the plaintiffs of the statutory remedy of appeal from the assessment to the Board of Tax Appeals.

Little need be said in support of this exception. The jurisdiction of the Board is statutory and special. Except in the case of a "jeopardy" assessment (not here involved) it arises upon the giving of the so-called "sixty day notice" under Rev. Act of 1926, Sec. 283 (a) (44 Stat. Part 2, p. 63.) providing that "if after the enactment of this act the Commissioner determines that any assessment should be made in respect of any income * * * * tax imposed by * * * * the Rev. Act of 1928 * * * * the Commissioner is authorized to send by registered mail to the person liable for tax, notice of the amount proposed to be assessed;" whereupon under the provisions of Sec. 274 (a) 44 Stat. Part 2, p. 55) the taxpayer is given sixty days to appeal to the Board for a redetermination.

In the case of Antoinette J. Mitchell vs. Com., (Docket No. 38023, April 29, 1931, not yet officially reported in full,) the Board, referring to previous decisions, held that the statutory method of notice is exclusive and that where the notice had not been sent to the proper person or address the Board had no jurisdictio n of an appeal from a proposed deficiency assessment and could pass upon no further question than that of jurisdiction.

In the case of French vs. Com., 10 B. T. A., 665, 666, and in previous cases the Board had held that it had no jursidiction over a proceeding arising solely from the rejection of a claim for refund.

Inasmuch as the sole occasion for the action of the Commissioner in the case at Bar was the plaintiffs' application for a refund, and cumulatively for the additional reason that no notice was given as required by statute, it is submitted that the Board of Tax Appeals would properly decline to entertain an appeal. It is the manifest intent of the statute that such appeal should be allowed in every case involving a deficiency assessment, and, by the course of procedure upheld by the Courts in this case, the plaintiffs have been deprived of that right.

V.

The decision imposed upon the plaintiffs the burden of justifying the finding of the Commissioner in the assessment of the tax and disproving his assertion in rejecting the application for refund, contrary to the established presumption in favor of the former finding.

The District Court found, as shown in the statement of the case, supra, that the Commissioner, in November 1925, redetermined the tax in question, finding that the greater portion of the item of $20,750.00 attorneys' fees represented a "business" expense of the estate, and allowed the same as a deduction. The Court further found that on May, 18, 1929 in rejecting the claim for refund the Commissioner advised that this item was disallowed as an "administrative" expense.

Upon this state of facts the District Court held (R. 40.) that "in a suit to recover alleged illegal taxes collected, the burden of proving the illegality rest upon the taxpayer * * * * and in the strict application of the latter principle as concerns the item of attorneys' fees, the burden placed upon the taxpayer has not been discharged by plaintiffs' showing in this case."

The Court of Appeals held (R.46) that "the action to recover on a claim for refund is in the nature of an action for money had and received and it is incumbent upon the claimant to show that the United States has money which belongs to him * * * * Since in the instant case the trustees had not overpaid the tax, the claim for refund was properly denied."

In the discussion of point I. supra, we called attention to the fact that the action was not based on the rejection of the claim for refund but rather on the overpayment of the tax assessed; that the errors assigned in the claim for refund were conceded but that the Commissioner asserted an offset by reversing his position on the item of attorneys' fees. Therefore, if there was any failure on the part of the plaintiffs to sustain the burden of proof, it was a failure with respect to the item of attorneys' fees.

The position of the defendant was thus essentially a plea of confession and avoidance although the answer in the case (R. 4) gave no hint of such a defense. If the government had availed itself of the statutory provision for collection by suit, without assessment, it would, of course, have had the burden of proof on this point. The position of the defendant would manifestly have been no stronger if a plea of confession and avoidance had been interposed in the present suit.

The familiar rule, quoted from the opinions of the lower courts, relating to the burden of proof in an action for money had and received, means, we think, no more than it is incumbent upon the plaintiff to show a prima facie right sanctioned by law and equity; not that he must show that the defendant has no potential right nor can establish any kind of a claim. The rule, we understand, grew out of the common law practice of pleading in an action in assumpsit, where a very general form of statement was employed, and would seem to be of only limited application in a case like this where the specific facts were set out in detail. (R. 1-3.)

It was contended in the petition for rehearing (R. 52) that the plaintiffs were entitled to rely upon the presumption, usually invoked by the Government, but here available to the tax payers, that the assessment is correct, and that the party attacking the assessment has the burden of proof; and that apart from this established rule in revenue cases it is an accepted principle of legal procedure in actions for money had and received, that if any facts exist which take the case out of the general rule and exempt the defendant from liability the burden is upon him to show these facts.

This rule would seem to be of full application to the position of the parties in the present case in view of the established doctrine in tax cases interpretation of statutes levying taxes, it is the established rule not to extend their provisions by implication beyond the clear import of the language used or to enlarge their operation so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the government and in favor of the citizen". (Gould vs. Gould, 245 U. S. 151; U. S. vs. Merriam, 263 U. S., 179, 187.)

The rule has been frequently applied in proceedings before the Board of Tax Appeals, and the burden placed upon the defendant as against the taxpayer, where the Commissioner has undertaken to avoid the taxpayer's contention by asserting a counter error (General Lead Batteries Co. vs. Com., 2 B. T. A., 392, 395; Berkshire Cotton Mfg. Co. vs. Com., 5 B. T. A., 1230, 1242, 1242; Schilling Grain Co. vs. Com, 8 B. T. A., 759, 762-763; Texas and Pacific R. Co. vs. Com., 9 B. T. A., 365; McFetridge vs. Com., 9 B. T. A., 759, 762-763; Wolferman vs. Com., 10 B. T. A., 285, 287; Crider Bros. Com. Co. vs. Com., 10 B. T. A., 348, 350; Henderson Tire and Rubber Co. vs. Com., 12 B. T. A., 716, 720.); where reliance is placed upon a letter of the Commissioner seeking to set up a greater deficiency; (Fowler vs. Com., 6 B. T. A., 250, 254-255); where the Commissioner relied upon an exception to the statute of limitations, (Farmers' Feed Co., vs. Com., 10 B. T. A., 1069, 1072.)

In the case at bar there was no plea of error or offset, no suggestion of fraud, no explanation for the reversal of the Commissioner's finding of fact with respect to the character of the deduction, no reassessment, no opportunity of hearing afforded the taxpayer. On the contrary the power to make an assessment was expressly disclaimed. It seems to us that it would be an anomaly in judicial procedure in general, and particularly in tax cases, if when overpayment of a particular assessment has been admitted, the Government could avoid restitution by the suggestion that facts existed or that different form of assessment might have been adopted which would create an apparent liability.

When one reflects that a tax is an involuntary contribution imposed upon the citizen for the necessary support of the government, which he must pay first and challenge afterward; that the legislative power to prescribe the conditions and the rate of taxation is comprehensive and well nigh unlimited; that the administrative officers are clothed with an initiative and a discretion in the performance of their functions, which reduces the taxpayer to a role of passivity and patience, the importance and necessity of a judicial remedy at the end of the process becomes manifest. Hence it is that the courts have firmly established the principle that when a claimed tax liability which has not been assessed is subjected to judicial scrutiny the taxing power has the burden of justifying it; that it must show a tax obligation clearly authorized by express statute; that it must account for a definite charge upon the particular taxpayer through timely procedure with due process by the officers charged by law with the necessary functions of assessment and collection.

VI.

Apart from the five year Statute of Limitations above referred to the decision extends and increases the inter-circuit confusion of authority on the question of the extent and limitations of the power of the Commissioner to re-examine, redetermine, and reassess a tax after the original assessment.

Within the past three years, in a series of decisions involving the extent of the Commissioner's power to redetermine a tax within the statutory period, an apparent conflict has arisen between the Circuit Courts of Appeals in at least four of the circuits. It does not appear to us that the views expressed in the different opinions are reconcilable with each other, but whether the particular cases involved are susceptible of being so distinguished from one another upon the facts, that a direct conflict may be avoided, there is unquestionably an impression among the Courts that they constitute diverging lines of authority.

While the case at Bar is not ruled exclusively by the decisions of this particular class, nevertheless the question is directly and fairly involved. If this Court determines to en-

tertain and review the present case, it is submitted that the question here propounded should be considered and determined.

The Circuit Court of Appeals of the Sixth Circuit, in Woodward vs. Kales, 26 Fed. (2d) 178, discussed exhaustively the power of the Commissioner to review an assessment on a question of fact (profit on sale of stock) and held that in the absence of fraud, etc., such authority did not exist.

The Circuit Court of Appeals of the Second Circuit, in Loewy vs. Com 31 Fed. (2d) 652, upheld a determination of the tax (disallowance of depreciation reserve for bad debts) where there had been an agreement between the taxpayer and the Commissioner, waiving the limitation and consenting that an assessment might be made. The Court called attention to the fact that there had been no previous assessment.

The Circuit Court of Appeals of the Eighth Circuit, in Holmquist vs. Blair, 35 Fed (2d) 10, decided that a previous assessment against a corporation involving the rate of depreciation to be used in determining the gain on a sale of capital assets would not preclude the Commissioner from considering and determining that question anew in assessing the income of its stockholders deprived from liquidating dividends.

The Circuit Court of Appeals of the Sixth Circuit, in Austin Co. vs. Com., 35 Fed. (2d) 910, (without disapproving the doctrine of Woodward vs. Kales, supra), by a majority decision, upheld the action of the Commissioner in setting aside a previous special assessment and redetermining the tax, assuming that he acted on new evidence of the facts.

The Circuit Court of Appeals of the Third Circuit, in McIlhenny vs. Com., 39 Fed. (2d) 356, upheld a redetermination by the Commissioner involving a question of loss sustained by the taxpayer heir on sale of assets of his father's estate in process of administration-apparently a question of law.

A District Court within the Sixth Circuit, in Boyne City Lumber Co. vs. Doyle, 47 Fed. (2d) 772, recently followed the doctrine of Woodworth vs. Kales, supra, in denying the power of the Commissioner to redetermine without new evidence a question of value which had been determined in a previous regular assessment.

Evidence of the general recognition of a conflict among the decisions on this subject is seen in the references to the cases in Holmquist vs. Blair; McIlhenny vs. Com.; and Boyne City Lumber Co. vs. Doyle, supra.

All of these cases involved redeterminations made or attempted within the statutory period upon formal notice of the taxpayer, with the avowed object of reassessment, and with opportunity for appeal. In all these respects they are distinguishable from the present case which turns upon the authority of the Commissioner to redetermine the tax when acting upon an application for refund after the statutory period and without notice of reassessment.

It is submitted, therefore, that because of the novelty of the proceeding here involved, the effect given by the Court to the Commissioner's action, the manifest bearing it potentially has upon every tax recovery case, the obscurity which the decision casts upon the statute of limitations upon assessments, the disregard of the Constitutional and statutory requirements of due process in the matter of hearing before the Commissioner and review by the Board of Tax Appeals, the reversal of the settled rule in respect to the burden of proof, and finally because of the growing confusion of doctrine on the power of the Commissioner to reassess,-all of which conditions are prolific causes of litigation, the public interest calls for the authoritative and final decision of this Court.

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